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Mansion Properties Sdn Bhd v Sham Chin Yen & Ors

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(i)-91–11 OF 2019(P)
ROHANA YUSUF PCA, AZAHAR MOHAMED CJ (MALAYA) AND ZAWAWI SALLEH FCJ
24 NOVEMBER 2020

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Companies and Corporations — Application to enable scheme of arrangement and to restrain creditors from suing company — Company applied to High Court under ss 366 and 368 of the Companies Act 2016 ('the CA') for orders to convene creditors' meeting to approve scheme of arrangement and to prevent creditors from suing it — Whether company abused process of court by applying for said orders ex parte without serving application on creditors — Whether ex parte orders thereby obtained were bad and liable to be set aside — Whether creditors suffered prejudice or breach of natural justice — Whether creditors were entitled to set aside the ex parte orders if they wished — Whether ex parte mode of application was desirable for s 368 of the CA to achieve legislative purpose of enabling quick action to preserve status quo and prevent company's assets from being dissipated pending approval of scheme of arrangement — Whether s 368 contained mandatory safeguards to prevent abuse of restraining orders

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The decisive question in the instant appeal was whether in the absence of any express provision on the relevant procedure, the appellant's filing of an application ex parte to obtain orders under ss 366 and 368 of the Companies Act 2016 ('the CA') was an abuse of process of court which rendered the orders liable to be set aside. The appellant was the developer of a residential complex which included a condominium. The respondents were buyers of units in the condominium and had sued the appellant in the sessions court for damages ('LAD') for not giving them vacant possession of their units on time. Faced with financial difficulties, the appellant filed an ex parte originating summons ('OS') in the High Court pursuant to ss 366 and 368 of the CA seeking (under s 366) an order to convene a meeting of its creditors to approve a proposed scheme of arrangement ('the proposed scheme') to settle its debts and (under s 368) an order restraining creditors from suing the appellant pending approval of the proposed scheme. Upon obtaining the orders it sought ('the first OS order'), the appellant served copies of the same on the respondents who proceeded to apply to intervene and set aside the order, reject the proposed scheme and obtain leave to continue with their suits against the appellant. Meanwhile, pursuant to the first OS order, a creditors' meeting was convened which approved the proposed scheme. Despite knowing that the respondents were applying to set aside the first OS order, the appellant filed another ex parte OS (which came before a different judge) seeking the court's sanction to the

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proposed scheme approved at the creditors' meeting. Upon obtaining the court's sanction, the appellant served copies of that order ('the second OS order') on the respondents who again applied to intervene to set aside the second OS order or have it stayed until their application to set aside the first OS order was determined. The High Court jointly heard all the applications filed by the respondents and dismissed their prayers to set aside the first and second OS orders. The High Court held that the proposed scheme was a bona fide attempt by the appellant to generate sufficient funds to complete the residential complex project and reach a compromise with its creditors. Dissatisfied with the decision, the respondents appealed. The Court of Appeal ('COA') allowed their appeal, set aside the first and second OS orders and held that the proposed scheme was not binding on the respondents. The COA held that since the first OS contained an application for a restraining order, it should not have been made ex parte but should have been served on the respondents so that they had an opportunity to be heard before an order was made. The COA decided that the non-service of the first OS was a procedural non-compliance and an abuse of court process which could not be cured by the subsequent service on the respondents of the first OS order. The COA further ruled that the appellant had not acted bona fide when it 'secretly' proceeded with the second OS application while the respondents' application to set aside the first OS order was pending before another High Court judge. Leave to appeal against the COA's decision was granted to the appellant on the sole question whether the first OS order was an abuse of court process which rendered the entire court-sanctioned proposed scheme liable to be set aside.

Held, unanimously answering the leave question in the negative, setting aside the COA's decision and reinstating the orders of the High Court:

(1) The CA did not explicitly say whether an application under ss 366 and 368 of the CA must be made ex parte or inter partes. The purpose of s 368(1) of the CA was to ensure that a company's restructuring efforts were not rendered nugatory pending the approval of a scheme of arrangement. It sought to preserve the status quo and to prevent efforts to develop and approve a scheme of arrangement from being thwarted by the dissipation of the company's assets. In the light of the potential necessity for immediate action and speedy procedures, an ex parte application was suitable and appropriate to achieve the legislative purpose (see paras 27–34, 45 & 47).

(2) Where an ex parte order was granted under s 368 of the CA, the affected creditors had the right to intervene in the proceedings and apply to set aside the order. This had been the general practice and was also the practice adopted in the present appeal. Since the first OS order was served on the respondents and they, in turn, successfully intervened in the proceedings and applied to set aside the order, no prejudice or breach of

natural justice was occasioned to them by reason of the ex parte nature of the first OS application or the omission to serve the application on them (see para 48).

(3) There was nothing inherently objectionable about filing an ex parte application under s 368 of the CA; the general practice was in line with the legislative purpose and did not deprive the affected parties of the right to be heard. As such, the filing of the ex parte application in the present case without serving it on the respondents was not an abuse of process which rendered the second OS order liable to be set aside (see paras 49 & 59).

(4) Subsections (2) to (7) of s 368 of the CA imposed a number of safeguards in respect of restraining orders granted under s 368(1). These statutory requirements were mandatory and their non-compliance could render the restraining order liable to be set aside for irregularity. It was clear from ss 368(2)–(7) that the Legislature had addressed its mind to the specific question of what measures and safeguards were necessary to avoid any abuse of process even though it did not consider it necessary to stipulate that an application for a restraining order had to be made ex parte or be served on the creditors. Since the Legislature had already addressed its mind to the issue and made provision thereon, it was not open to the court to supplant any perceived insufficiencies in the legislation by imposing additional requirements not envisaged by Parliament (see paras 50–51 & 57).

[Bahasa Malaysia summary

Persoalan untuk diputuskan dalam rayuan ini adalah sama ada dengan ketiadaan apa-ap peruntukan yang jelas berhubung prosedur yang relevan, pemfailan permohonan ex parte perayu untuk mendapatkan perintah-perintah di bawah ss 366 dan 368 Akta Syarikat 2016 ('AS') adalah satu penyalahgunaan proses mahkamah yang menjadikan peintah-perintah tersebut boleh diketepikan. Perayu merupakan pemaju kompleks perumahan yang mana termasuklah satu kondominium. Responden-responden ialah pembeli-pembeli unit-unit kondominium tersebut dan telah menyaman perayu di mahkamah sesyen untuk ganti rugi ('LAD') kerana tidak memberi mereka milikan kosong unit-unit mereka tepat pada masanya. Berhadapan dengan masalah kewangan, perayu telah memfailkan saman pemula ex parte ('SP') di Mahkamah Tinggi menurut ss 366 dan 368 AS memohon (di bawah s 366) satu perintah untuk mengadakan mesyuarat pemiutangnya bagi meluluskan satu cadangan skim perkiraan ('skim yang dicadangkan') untuk menyelesaikan hutangnya dan (di bawah s 368) satu perintah melarang pemiutang-pemiutang daripada menyaman perayu sementara menunggu kelulusan skim yang dicadangkan. Setelah mendapat perintah-perintah yang dipohonnya ('perintah SP pertama'), perayu telah menyampaikan sainan yang sama kea as responden-responden yang seterusnya telah memohon untuk

mencelah dan mengetepikan perintah itu, menolak skim yang dicadangkan dan mendapat kebenaran untuk meneruskan dengan saman-saman mereka terhadap perayu. Sementara itu, menurut perintah SP pertama, satu mesyuarat pemiutang telah diadakan yang meluluskan skim yang dicadangkan. Walaupun mengetahui bahawa responden-responden sedang memohon untuk mengetepikan perintah SP pertama itu, perayu telah memfailkan satu lagi SP ex parte (yang di hadapan hakim lain) memohon sanksi mahkamah terhadap cadangan skim yang telah diluluskan di mesyuarat pemiutang. Setelah mendapat sanksi mahkamah, perayu telah menyampaikan beberapa salinan perintah tersebut ('perintah SP kedua') ke atas responden-responden yang sekali lagi telah memohon untuk mencelah bagi engetepikan perintah SP kedua atau menggantungkannya sehingga permohnan mereka untuk mengetepikan perintah SP pertama ditentukan. Mahkamah Tinggi mendengar bersama semua permohonan oleh responden-responden dan menolak permohonan mereka untuk mengetepikan perintah-perintah SP pertama dan kedua. Mahkamah Tinggi memutuskan bahawa skim yang dicadangkan itu adalah percubaan bona fide oleh perayu untuk menjana dana yang mencukupi untuk menyiapkan projek kompleks perumahan itu dan mencapai kompromi dengan pemiutang-pemiutangnya. Berasa tidak puas hati dengan keputusan, responden-responden telah merayu. Mahkamah Rayuan ('MR') telah membenarkan rayuan mereka, mengetepikan perintah-perintah SP pertama dan kedua dan memutuskan bahawa skim yang dicadangkan itu tidak mengikat ke atas responden-responden. MR memutuskan bahawa oleh kerana perintah SP mengandungi permohonan untuk perintah larangan, ia tidak patut dibuat secara ex parte tetapi patut disampaikan ke atas responden-responden agar mereka mempunyai peluang untuk didengar sebelum suatu perintah dibuat. MR memutuskan bahawa SP pertama yang tidak disampaikan itu merupakan ketidakpatuhan prosedur dan satu penyalahgunaan proses mahkamah yang tidak boleh dipulihkan oleh penyampaian berikutnya perintah SP pertama itu ke atas responden-responden. MR selanjutnya memutuskan bahawa perayu tidak bertindak secara bona fide apabila ia 'secretly' meneruskan dengan permohonan SP kedua apabila permohonan responden-responden untuk mengetepikan perintah SP pertama masih beum selesai di hadapan hakim Mahkamah Tinggi yang lain. Kebenaran untuk merayu terhadap keputusan MR teah diberikan kepada perayu berhubung satu-satunya persoalan sama ada perintah SP pertama adalah satu penyalahgunaan proses mahkamah yang menjadikan keseluruhan skim yang dicadangkan yang disanksi mahkamah wajar diketepikan.

Diputuskan, sebulat suara menjawab persoalan berhubung kebenaran secara negatif, mengetepikan keputusan MR dan mengembalikan semula perintah-perintah Mahkamah Tinggi:

(1) MR tidak jelas mengatakan sama ada suatu permohonan di bawah ss 366

dan 368 AS mesti dibuat ex parte atau inter partes. Tujuan s 368(1) AS adalah untuk memastikan bahawa usaha penstrukturan semula syarikat tidak dianggap tidak baik sementara menunggu kelulusan suatu skim perkiraan. Ia memohon untuk mengekalkan status quo dan menghalang usaha untuk membangunkan dan meluluskan suatu skim perkiraan daripada digagalkan oleh pelupusan aset syarikat. Berdasarkan kemungkinan keperluan untuk tindakan segera dan prosedur yang cepat, permohonan ex parte adalah sesuai dan wajar untuk mencapai tujuan perundangan (lihat perenggan 27–34, 45 & 47).

(2) Di mana perintah ex parte diberikan di bawah s 368 AS, pemiutang yang terlibat mempunyai hak untuk mencelah dalam prosiding dan memohon untuk mengetepikan perintah tersebut. Ini telah menjadi amalam umum dan juga merupakan amalan yang diguna pakai dalam rayuan ini. Oleh kerana perintah SP pertama disampaikan ke atas responden-responden dan mereka, sebaliknya, berjaya mencelah dalam prosiding dan memohon untuk mengetepikan perintah itu, tiada prasangka atau pelanggaran keadilan semula jadi yang berlaku ke atas mereka oleh kerana sifat permohonan SP pertama atau peninggalan untuk menyampaikan permohonan itu ke atas mereka (lihat perenggan 48).

(3) Tiada apa-apa yang sememangnya boleh dibantah tentang pemfailan permohonan ex parte di bawah s 368 AS; amalan umum itu adalah selaras dengan tujuan perundangan dan tidak menafikan pihak-pihak terjejas hak untuk didengar. Oleh itu, pemfailan permohonan ex parte dalam kes ini tanpa menyampaikannya ke atas responden-responden bukanlah satu penyalahgunaan proses yang menjadikan perintah SP kedua wajar diketepikan (lihat perenggan 49 & 59).

(4) Subseksyen (2) hingga (7) kepada s 368 AS mengenakan beberapa perlindungan berkaitan perintah larangan yang diberikan di bawah s 368(1). Keperluan statutori tersebut adalah mandatori dan ketidakpatuhannya boleh menyebabkan perintah larangan itu wajar diketepikan kerana di luar aturan. Ia adalah jelas daripada ss 368(2)–(7) bahawa badan perundangan telah menumpukan mindanya kepada persoalan spesifik tentang langkah-langkah dan perlindungan yang pelru untuk mengelakkan apa-apa penyalahgunaan proses meskipun ia tidak menganggap ia perlu untuk menyatakan bahawa suatu permohonan untuk perintah larangan hendaklah dibuat secara ex parte atau disampaikan ke atas pemiutang. Oleh kerana badan perundangan telahpun menumpukan mindanya kepada isu tersebut dan membuat peruntukan berkenaan, ia tidak terbuka untuk mahkamah menggantikan apa-apa kekurangan yang dirasakan dalam perundangan dengan mengenakan keperluan tambahan yang tidak dijangkakan oleh Parlimen (lihat perenggan 50–51 & 57).]

Cases referred to

Foursea Construction (M) Sdn Bhd, Re [1998] 4 MLJ 99, HC (refd)
Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara Malaysa & Anor [1994] 2 MLJ 114, SC (refd)
Glencore Nickel Pty Ltd, Re [2003] WASC 18, SC (refd)
Im Skaugen Se and other matters, Re [2018] SGHC 259, HC (refd)
Jax Marine Pty Ltd and the Companies Act, Re (1967) 1 NSWR 145 (refd)
Kuala Lumpur Industries Bhd, Re [1990] 2 MLJ 180, HC (refd)
Nothman v Barnet Council [1978] 1 WLR 220 (refd)
PB Securities Sdn Bhd v Autoways Holding Bhd [2000] 4 MLJ 417, CA (refd)
PECD Bhd & Anor v AmTrustee Bhd and other appeals [2010] 5 MLJ 357, CA (refd)
Panglobal Bhd & Ors, Re [1999] 1 MLJ 590, HC (refd)
Pathfinder Strategic Credit LP and another v Empire Resources Pte Ltd [2019] SGCA 29, CA (refd)
Pelangi Airways Sdn Bhd v Mayban Trustees Bhd [2001] 2 MLJ 237, HC (refd)
Perwira Habib Bank Malaysia Bhd v Lum Choon Realty Sdn Bhd [2006] 5 MLJ 21, FC (refd)
Playcorp Pty Ltd v Venture Stores (Retailers) Pty Ltd (1992) 7 ACSR 193, SC (refd)
Reid Murray Acceptance Ltd, Re [1964] VR 82, SC (refd)
Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151 (refd)
Socooil Corporation Bhd v Ng Foo Chong & Anor [1981] 2 MLJ 7, FC (refd)
Sri Hartamas Development Sdn Bhd v MBF Finance Bhd [1990] 2 MLJ 31, HC (refd)
Tan Kim Hock Product Centre Sdn Bhd & Anor v Tan Kim Hock Tong Seng Food Industry Sdn Bhd [2018] 2 MLJ 1, FC (folld)
Thomas A Edison Ltd v Bullock (1912) 15 CLR 679, HC (refd)
Twist v Randwick Municipal Council (1976) 136 CLR 106, HC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 176(10)
Companies Act 2016 ss 118(4)(a), 176(10A), (10B), (10C), (10D), (10E), 365, 366, 366(1), 368, 368(1), (2), (3), (4), (5), (6), (7), 371, 471(2)
Housing Development (Control and Licensing) Act 1966
Rules of Court 2012 O 88 r 2
Rules of the Federal Court 1995 r 47(4)
Trade Description Act 2011 s 9

Appeal from: Civil Appeal No P-02(IM)(NCC)-1935–09 of 2018 (Court of Appeal, Putrajaya)

Ghazi bin Ishak (B Jeyasingam and Khor Wanxin with him) (Ghazi & Lim) for the appellant.
Siau Suen Min (Siau Suen Miin & Tan) for the respondents.

Zawawi Salleh FCJ (delivering judgment of the court):

INTRODUCTION

[1] This appeal concerns the proper procedure for applications under ss 366 and 368 of the Companies Act 2016 ('the CA').

[2] The appeal arose out of the ex parte applications by the appellant under ss 366 and 368 of the CA in respect of a proposed scheme of arrangement between the company and its creditors. In the applications, the appellant sought orders from the High Court to convene a creditors' meeting, to restrain all proceedings against the appellant and subsequently to approve the compromise or arrangement agreed to by a majority at the creditors' meeting.

[3] The question at the heart of this appeal is whether the applications under ss 366 and 368 of the CA should be made ex parte or inter parte.

FACTUAL ANTECEDENTS

[4] The appellant is the developer of a housing project known as D'Mansion, which includes a hotel and a condominium. The respondents are purchasers of the condominium units. The appellant did not deliver vacant possession of the condominium units within the stipulated time. The construction of the hotel had not been completed.

[5] Due to the delay in delivering vacant possession, some purchasers filed claims against the appellant for liquidated ascertained damages ('LAD') in the sessions court in 2017.

PREVIOUS PROCEEDINGS

[6] On 27 October 2017, the appellant filed an ex parte originating summons pursuant to ss 366 and 368 of the CA in the Penang High Court ('the first OS'). In the first OS, the appellant sought an order to convene a creditors' meeting for the approval of the appellant's proposed scheme of arrangement and an order to restrain all other proceedings against the appellant. The scheme was, inter alia, to reduce the appellant's debt to RM0.20 for each RM1 ('the proposed scheme').

[7] On 9 November 2017, the court granted an ex parte order to convene a

creditors meeting and an order restraining proceedings against the appellant for 90 days ('first order'). The appellant served copies of the first order on the respondents and other creditors on 11 November 2017.

[8] Pursuant to the first order, the creditor's meeting was convened on 14 December 2017, at which the proposed scheme was approved.

[9] The respondents filed applications in encls 6, 9 and 19 on 12 December 2017, 2 January 2018 and 14 January 2018, respectively in the first OS. Broadly, in these applications, the respondents sought:

(a) to intervene in the first OS proceedings;

(b) leave to continue and/or commence legal actions to claim LAD against the appellant;

(c) to reject the proposed scheme and set aside the first order; and

(d) alternatively, to stay the first order until an independent liquidator is appointed by the court to assess the viability of the proposed scheme.

[10] On 2 February 2018, the appellant filed another ex parte originating summons in the Penang High Court pursuant to s 366 of the CA, to seek the court's approval or sanction for the proposed scheme ('second OS'). The approval was granted by the court on 7 February 2018 ('second order'). The appellant then served the second order on the respondents on 21 February 2018.

[11] On 23 February 2018 and 28 February 2018, the respondents then filed applications in encls 6 and 7 respectively in the second OS, seeking:

(a) to intervene in the second OS proceedings;

(b) to set aside the second order; and

(c) alternatively, to stay the second order until the enclosures in the first OS have been heard and determined.

[12] The two proceedings were consolidated and heard under the second OS by an order dated 26 February 2018, pursuant to an application by the respondents. All the pending applications filed by the respondents were heard together.

THE HIGH COURT DECISION

[13] On 17 August 2018, the High Court allowed the respondents' application to intervene in the proceedings but dismissed all other prayers,

A including the prayers to set aside the first and second orders.

[14] In so holding, the High Court made the following findings:

(a) the respondents had a direct connection and interest with the proposed
B scheme and therefore ought to be allowed to intervene;

(b) the proposed scheme by the appellant was bona fide;

(c) the appellant had complied with all relevant legal provisions and the requisite steps in the CA for the implementation of the proposed scheme;
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(d) the purpose of the appellant's proposed scheme was to generate sufficient funds to complete the development project, obtain strata titles for purchasers of condominium units and reach a compromise with creditors
D to settle its debts. If the proposed scheme is not approved, the appellant would have no other choice but to be wound up.

THE COURT OF APPEAL DECISION

E **[15]** Aggrieved, the respondents filed an appeal to the Court of Appeal. The appeal was allowed.

[16] The Court of Appeal found that there had been procedural non-compliance and abuse of process by the appellant in making the
F applications, based broadly on the following grounds:

(a) firstly, the first OS was not served on the respondents and were heard ex parte; and

(b) secondly, the second OS was filed by the appellant:
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(i) in a different High Court from the first OS;

(ii) before the respondents' applications in the first OS had been heard; and

H (iii) without disclosing material facts regarding the respondents' pending applications in the first OS.

[17] In respect of the first OS, the Court of Appeal held that:

I (a) the first OS involved an application under s 366(1) of the CA to convene a creditors' meeting for the proposed scheme, and an application under s 368(1) of the CA for a restraining order. Since the first OS incorporated an application for a restraining order, it would necessarily mean that the application ought to be served on the respondents and heard inter partes;

(b) an application for a restraining order must be served on the creditors whose actions or proceedings are sought to be restrained, in order to give the creditors an opportunity to oppose the application; citing *Re Panglobal Bhd & Ors* [1999] 1 MLJ 590 and *Re Foursea Construction (M) Sdn Bhd* [1998] 4 MLJ 99; and

(c) the filing of the first OS without serving it on the respondents was an abuse of process. The subsequent service of the first order by the appellant could not save the application, which was already tainted for non-compliance with the statutory procedure. Since the first order is tainted and set aside, the subsequent second order is also liable to be set aside.

[18] In respect of the second OS, it was held and found that:

(a) having obtained the first order from one High Court, the appellant filed the second OS and obtained the second order before a different High Court, secretly and without the respondents' knowledge;

(b) the appellant's action in secretly filing the second OS and obtaining the second order in a different court was mala fide, giving rise to the inference that the proposed scheme was not bona fide;

(c) since the judge in the first High Court had given directions for the appellant to convene the creditors' meeting and for the restraint of proceedings, the respondents' applications in encls 6, 9 and 16 ought to have been heard by the same judge. Only then the judge would be aware of the respondents' intervention and objections in deciding whether to affirm or set aside the first order. It was improper for the judge in the second High Court to have disposed of those applications;

(d) at the stage of determining whether or not to sanction a scheme of arrangement, the court exercises a supervisory function. The court must ensure that the meeting was held in accordance with its previous order and that the proposals have been duly approved by the requisite majority and may hear the objections by creditors against the scheme of arrangement; and

(e) the appellant ought not to have filed the second OS before the second judge when the respondents' applications in the first OS were still pending and without disclosing the material facts regarding those pending applications.

[19] The Court of Appeal found that the appellant's applications in a summary manner under ss 366(1) and 368(1) of the CA was bad for procedural non-compliance and abuse of process. Accordingly, the Court of Appeal set

aside both the first and second orders and held that the proposed scheme was not binding on the respondents.

[20] Leave was granted by this court in respect of a single question of law relating to the procedure for applications under ss 366 and 368 of the CA:

> Whether an Order made pursuant to an application under section 366 and section 368 of the Companies Act 2016 subsequently served on the creditors is an abuse of the Court process which renders the entire Court scheme or entire Court-sanctioned scheme liable to be set aside.

THE PARTIES' COMPETING SUBMISSIONS

[21] The nub of the appellant's submissions before this court may be summarised as follows. In respect of the procedure in the first OS, the appellant submitted that:

(a) where the company is the applicant, an application to convene a creditors' meeting under s 366 of the CA is normally made ex parte;

(b) a restraining order is usually sought together with the application to convene a creditors' meeting; and

(c) it is common practice to file an ex parte application for a creditors' meeting under s 366 of the CA and to incorporate an application for a restraining order under s 368 of the CA. As such, the Court of Appeal had erred in holding that because the first OS incorporated a restraining order, it must be served on the creditors and must be heard inter partes.

[22] In respect of the second OS, the appellant submitted that:

(a) there had been no breach of natural justice. The respondents had attended and voted in the creditors' meeting and were given the opportunity to intervene in the proceedings;

(b) the filing of the second OS in a different court was not done in secret. Upon filing a new originating summons, a new case number is given by the court, and the second OS thus came to appear in the cause list of a different High Court;

(c) the filing of the second OS was the correct procedure based on *Atkin's Court Forms*, which required a fresh originating summons to be filed at the stage of obtaining the court's sanction for a scheme of arrangement;

(d) there had been full and frank disclosure of all material facts, in the second OS including the respondents' pending applications in the first OS, before the High Court; and

(e) after the first and second orders were served on the respondents, all of the respondents' applications under the first and second OS were consolidated and heard before a single judge.

[23] The respondents resisted the appeal. The respondents' submissions focused on the first OS and can be summarised thus:

(a) the question of law only relates to one aspect of the Court of Appeal judgment (namely paras [37]–[43]);

(b) ss 366 and 368 of the CA are silent as to whether applications are to be made ex parte or inter partes. Both sections only require applications to be made 'in a summary way', which means the issue is to be dealt with, by affidavit without calling witnesses for trial;

(c) the application for a restraining order must be made inter partes and not ex parte. Ex parte applications should only be allowed where there is no affected party to be served or where the law expressly so provides. Reliance is placed on *Re Reid Murray Acceptance Ltd* [1964] VR 82;

(d) the legislative intention of s 368(2) of the CA is to ensure that creditors are aware of the application. The only way to ensure such awareness is by an inter partes hearing of the application;

(e) where a procedure allows an ex parte application, provision is also made for a subsequent inter partes hearing involving the affected parties. Since no such provision is made in the CA, the necessary implication is that the application is not meant to be made ex parte;

(f) an ex parte application for a restraining order is in breach of natural justice. Such an application affects the statutory rights of the purchasers without giving them an opportunity to make representations, and defeats the purpose of the Housing Development (Control and Licensing) Act 1966; and

(g) the subsequent service of the first order does not cure the prior breach of natural justice. The ex parte application in the first OS is incompatible with the court's supervisory duty, a non-compliance of procedure, and an abuse of process.

DECISION

[24] The key issue in the present appeal is the specific finding by the Court of Appeal that the filing of the first OS by way of an ex parte application and the failure to serve the application on the appellants was an abuse of process, which is not cured by the subsequent service of the ex parte order. The relevant portion of the Court of Appeal judgment is reproduced as follows:

[39] It is not disputed that the application under s 366(1) of the Act to convene

meeting of creditors for the proposed scheme of Arrangement and restraint order under s 368(1) of the Act were made under the same originating summons ie the first proceeding dated 27 October 2017 and 'in a summary way of the company' under ss 366(1) and 368(1) of the Act. Based on such application, especially the application had incorporated restraint order on all proceedings by the appellants against the company ie the respondent, in our opinion, *it would necessarily mean that the application ought to be served on the appellants and the application was to be heard inter parte. …*

[43] The respondent admitted that the originating summons was not served on the appellants. The respondent's action in filing the originating summons and without serving the originating summons to the appellant was an abuse of court process. *We were also of the view that even after having served the first ex parte order dated 9 November 2017 on the appellants as if the appellant was put to notice and given the opportunity to intervene and challenge the order, the service of the order could not save the application which already been tainted for non-compliance of the procedure under the Act. In other words, the first ex parte order dated 9 November 2017 is liable to be set aside on the ground that the application in the first place was an abuse of court process.* (Emphasis added.)

[25] As can be seen, the scope of the question of law reserved for our determination is relatively narrow and is confined to the alleged abuse of process in the appellant's filing of the first OS as an ex parte application and their failure to serve the same. The leave question does not concern with the procedure adopted in the second OS or the fairness or bona fides of the proposed scheme. Given such a question, the issues in this present appeal should be confined only to the ex parte nature and non-service of the first OS (see r 47(4) of the Rules of the Federal Court 1995 and *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151 at p 173).

SCHEMES OF ARRANGEMENT

[26] In Malaysia, provisions on scheme of arrangement and reconstruction can be found in ss 365 and 371 of the CA. Scheme of arrangement provides companies saddled with debts, a brief respite from their daily struggles of managing their affairs and the demands of the creditors. In *Pathfinder Strategic Credit LP and another v Empire Resources Pte Ltd* [2019] SGCA 29, the Court of Appeal of Singapore stated at para [27]:

27. A scheme of arrangement is a statutory mechanism for the implementation of a transaction between company and its members or creditors. In recent years, for various reasons, it has become an increasingly popular tool for companies seeking to effect a debt restructuring. These reasons include the fact that it permits the debtor to remain in control of the company, and further permits a statutory majority of the company's creditors to impose their views even over the objections of a minority group of dissentients. For the same reasons, safeguards to protect the interests of the minority creditors, and of the creditors as a whole, are especially important.

[27] Section 366 of the CA provides a clear procedure on implementation of scheme of arrangement. The section provides:

> 366 *Power of Court to order compromise or arrangement with creditors and members*
>
> (1) The Court may, on an application under this Subdivision, order a meeting *in a summary way* to be summoned in such manner as the Court directs, by either:
>
> (a) the company;
>
> (b) any creditor or member of the company;
>
> (c) the liquidator, if the company is being wound up; or
>
> (d) the judicial manager, if the company is under judicial management. (Emphasis added.)

[28] The process by which a scheme of compromise or arrangement becomes binding on the company and its creditors generally comprises three stages:

(a) firstly, either the company, creditors, members of the company, liquidator or judicial manager may apply to the court to convene a creditors' meeting;

(b) secondly, the proposed scheme is presented at the meeting to be agreed upon by a majority of 75% of total value of creditors present and voting, either in person or by proxy or at the adjourned meeting; and

(c) thirdly, upon obtaining the requisite approval, a further order by the court is to be obtained to sanction the scheme of arrangement.

[29] The role of the court at this stage is essentially procedural rather than supervisory in nature. Generally, the application is made ex parte and the bona fides of the application is assumed (see *Sri Hartamas Development Sdn Bhd v MBF Finance Ltd* [1990] 2 MLJ 31). The High Court at para [32] of the judgment stated that; 'Where the company is the applicant, the originating summons is normally filed on an ex parte basis and with the company as the sole party to the proceedings' (see: S Lee, K K F Poh, *Companies Act 2016: The New Dynamics of Company Law in Malaysia* (Kuala Lumpur: CLJ Publications, 2017) as quoted with approval by the Court of Appeal below). Like all applications which is made ex parte basis, the applicant is subject to the duty of full and frank disclosure of all material facts (see *PECD Bhd & Anor v AmTrustee Bhd and other appeals* [2010] 5 MLJ 357 (CA) at paras [27] and [67]).

APPLICATION FOR ORDER TO RESTRAIN FURTHER PROCEEDINGS

[30] Malaysia's scheme of arrangement framework allows for a restraining order to be granted. The restraining order would restrain any legal proceedings to be initiated against the applicant company applying for a scheme of arrangement.

[31] Section 368 of the CA provides:

> 368 *Power of Court to restrain proceedings —*
>
> (1) If no order has been made or resolution passed for the winding up of a company and a compromise or arrangement has been proposed between the company and its creditors or any class of those creditors, the Court may, in addition to any of its powers, on the application in a summary way of the company or any member or creditor of the company, restrain further proceedings in any action or proceeding against the company except by leave of the Court and subject to any terms as the Court may impose. (Emphasis added.)

[32] The phrase 'in a summary way' appears in both ss 366(1) and 368(1) of the CA. In this context, the phrase has been interpreted to mean that the court is entitled to deal with every issue summarily without the necessity of a trial (see *PB Securities Sdn Bhd v Autoways Holding Bhd* [2000] 4 MLJ 417 (CA) at p 425). It does not itself stipulate whether the application is to be made ex parte or inter partes.

[33] Order 88 r 2 of the Rules of Court 2012 specifies that proceedings under the CA (except those relating to the winding up of companies and capital reduction) shall be commenced by originating summons. It is also silent on whether the application under s 368(1) of the CA can be made ex parte and whether it must be served.

[34] It has been a common practice for an applicant to seek an order to restrain proceedings on an ex parte basis. The practice has been imbedded in our law (see *Re Kuala Lumpur Industries Bhd* [1990] 2 MLJ 180; *Pelangi Airways Sdn Bhd v Mayban Trustees Bhd* [2001] 2 MLJ 237), often concurrently with an order to convene a creditors' meeting (see *PECD Bhd & Anor v AmTrustee Bhd and other appeals* [2010] 5 MLJ 357; *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1990] 2 MLJ 31; *Re Glencore Nickel Pty Ltd* [2003] WASC 18).

[35] However, the respondents now dispute the propriety of this practice. The respondents posited that the application for restraining order under s 368 of the CA (whether or not applied together with s 366 of the CA) should be

made inter parte and not ex parte, at least in a situation where the identities and particulars of creditors are ascertainable. The underlying reasons are: A

(a) to ensure that creditors are aware of the application; and

(b) to ascertain that restraining order is only granted under specific conditions to avoid any abuse. B

[36] In support of his submission, learned counsel for the respondents referred us to the following cases:

(a) in *Re Reid Murray Acceptance Ltd* [1964] VR 82 at p 303, Adam J stated that 'the application for the stay of proceedings should have been made inter partes on summons directed to the trustee and served not later than the time prescribed by the Rules of the Court. The summons was not served in time. Accordingly, the order for a stay was irregularly obtained in the absence of the party affected'; C D

(b) in *Re Foursea Construction (M) Sdn Bhd* [1998] 4 MLJ 99 at p 103, Rekhraj J stated that 'Such an application under the section (s 176(10) of the Companies Act 1965; predecessor to s 368(1) of the CA) must be dealt with summarily, ie by hearing inter partes, with an opportunity given to the known creditors on record to make their representation, and not ex parte, as by so proceeding, great injustice is caused to the creditors who are legally entitled to enforce execution proceeding (*ex debito justitiae*) and are thus put to further unnecessary expense in setting aside the orders'; and E F

(c) in *Re Panglobal Bhd & Ors* [1999] 1 MLJ 590 at p 592, Abdul Aziz J stated that 'this application ought to be served on the creditors whose actions or proceedings are sought to be restrained, so that they may have an opportunity to oppose the application for the restraining order'. G

[37] The critical question is whether in the absence of any express provision on the relevant procedure, the appellant's filing of an ex parte application for an order under s 368(1) of the CA without serving it on the respondents constitutes an abuse of process in the circumstances of this case. H

GENERAL PRINCIPLES ON EX PARTE APPLICATIONS

[38] As a general rule, no order should be made to the prejudice of a party unless he has the opportunity of being heard in defence. However, ex parte applications are recognised as necessary and appropriate in certain circumstances. As observed by Isaacs J in *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679 at p 681: I

> There is a primary precept governing the administration of justice, that no man is to

A be condemned unheard; and therefore, as a general rule, no order should be made to the prejudice of a party unless he has the opportunity of being heard in defence. *But instances occur where justice could not be done unless the subject matter of the suit were preserved, and, if that is in danger of destruction by one party, or if irremediable or serious damage be imminent, the other may come to the Court and ask for its*
B *interposition even in the absence of his opponent, on the ground that delay would involve greater injustice than instant action.* But when he does so, and the Court is asked to disregard the usual requirement of hearing the other side, the party moving incurs a most serious responsibility. (Emphasis added.)

C **[39]** In this regard, useful guidance may be drawn from the judgment of the Federal Court in *Tan Kim Hock Product Centre Sdn Bhd & Anor v Tan Kim Hock Tong Seng Food Industry Sdn Bhd* [2018] 2 MLJ 1. The case arose from an application for a trade description order ('TDO') under s 9 of the Trade Description Act 2011 ('the TDA'). The section itself does not state explicitly
D whether the application may be made ex parte or otherwise.

[40] One of the issues before the court was whether such an application could be made on an ex parte basis. The appellants argued that it could not, on the ground that generally, a statutory provision must specifically states that an
E application can be made if it is so intended. It was further argued that, since the effect of a TDO is to impose criminal liability and deprive a trader of a proprietary right, the affected trader should be accorded an opportunity to be heard before such an order is made; to allow an ex parte application would be
F a denial of justice.

[41] These arguments were rejected by this court. It was observed that nothing in the particular section or the TDA required the hearing to be inter partes, or for any papers to be served on any affected persons. In *Socooil Corporation Bhd v Ng Foo Chong & Anor* [1981] 2 MLJ 7, it was held that an
G ex parte application would be the most appropriate mechanism to achieve the legislative purpose and satisfy the mischief that the provision seeks to overcome per Balia Yusof FCJ (at paras [41]–[42]):

H For a meaningful and effective use of a TDO, obtaining it swiftly and characterised with some elements of surprise is an essential ingredient. Hence, an ex parte application would be the most suitable and appropriate ... Unless a TDO is obtained swiftly through the mechanics of an ex parte application any effort to curtail the problem of imitation goods flooding the market would be seriously hampered.

I **[42]** The court took note of the prevalent practice among practitioners to proceed in an ex parte fashion in making applications for TDOs under s 9 of the TDA. It was found that there was nothing wrong or illegal in such a practice, since the affected person retains the right to apply to set aside an ex

parte TDO (at paras [59]–[62]):

> An ex parte order can always be set aside and a court is not functus officio to review a TDO obtained ex parte although perfected. The right of an affected person to apply to set aside an ex parte TDO is a right which exists over and above the other civil remedies available to him. That is exactly what the appellants did in this case. In the High Court below, they applied to intervene and to set aside the ex parte TDO. ...
>
> Ramly Ali J (as he then was) in LB Confectionary Sdn Bhd (*LB Confectionery Sdn Bhd v Qaf Ltd; Perbadanan Harta Intelek Malaysia (interested party) & another case* [2008] MLJU 1094; [2008] 10 CLJ 264) approving an ex parte TDO application therein stated:
>
> The above suggests that since the court can still review its grant of a TDO at a later stage, eg, by way of granting a subsequent application to set aside the same, therefore there are no reasons as to why an applicant may not elect for the application to be heard ex parte.

[43] For those reasons, the Federal Court held that the procedure of applying for a TDO by way of an ex parte application was permissible. The general approach in *Tan Kim Hock* can be distilled as follows:

(a) where the statute does not expressly provide whether an application can be made ex parte or otherwise, the legislative silence is not determinative of the question;

(b) the court should have regard to the legislative purpose of the statutory provision. An ex parte application would be appropriate where there is a need for an order to be obtained swiftly in order to achieve the legislative purpose; and

(c) another factor to be considered is whether the court may still review the grant of the ex parte order. If an affected party has the right to apply to set aside the ex parte order, there may be no reason why the application cannot be heard ex parte.

APPLICATION TO FACTS

[44] In determining whether an ex parte application is permissible under s 368 of the CA, the approach in *Tan Kim Hock* may be used as a guide with regard to the factors to be considered. A primary consideration is the legislative purpose in enacting the relevant provision.

[45] In our view, the purpose of s 368(1) of the CA is to ensure that a company's restructuring efforts are not rendered nugatory pending the approval of a scheme of arrangement. 'The desire of the legislature [is to] protect the assets of the company pending the possible adoption of a scheme ...

in the interests of the creditors generally' (see *Playcorp Pty Ltd v Venture Stores (Retailers) Pty Ltd* (1992) 7 ACSR 193 (Supreme Court of Victoria) at p 195).

[46] As elaborated by the Singapore High Court recently in *Re Im Skaugen Se and other matters* [2018] SGHC 259 at para [34], in respect of the Singaporean equivalent of s 368(1) of the CA:

> It was evident that s 210(10) existed to ensure that restructuring efforts were not scuttled or rendered nugatory by preserving the status quo pending the filing and disposal of an application for a scheme meeting to be called under s 210(1), and if such a meeting was called, pending the holding of that meeting. *Thus, the moratorium under* s 210(10) served two important functions. First, it allowed the company the breathing space to develop and refine a compromise or arrangement that had been proposed to its creditors pending an application under s 210(1) for the calling of a scheme meeting. This was important as, at that stage, the court had to be satisfied that it would not be futile to call the scheme meeting (*Re Ng Huat Foundations Pte Ltd* [2005] SGHC 112 (*Re Ng Huat*) at [9]; *The Royal Bank of Scotland NV v TT International Ltd* [2012] 2 SLR 213 at [64]). *Second, in the event a meeting of creditors was called pursuant to s 210(1), the moratorium allowed the status quo as between the company and its creditors to be maintained, to enable the creditors to decide whether to approve the proposed compromise or arrangement with or without further modifications and refinements.* In either scenario, the moratorium allowed the applicant time and space to refine the compromise or arrangement to a level of maturity to enable the creditors to take a view on its acceptability, and to express their position through a vote at a scheme meeting if one was ordered. It also allowed the applicant the time and space to secure sufficient creditor support for the compromise or arrangement. (Emphases added.)

[47] We can confidently say that the legislative purpose of s 368(1) of the CA is to preserve status quo and to prevent efforts to develop and approve a scheme of arrangement from being thwarted by the dissipation of the company's assets. In light of the potential necessity for immediate action and speedy procedures, an ex parte application would be suitable and appropriate to achieve the legislative purpose.

[48] Further, where an ex parte order is granted under s 368 of the CA, the affected creditors have the right to intervene in the proceedings and apply to set aside the order. This has been the general practice (see *PECD Bhd & Anor v AmTrustee Bhd*; *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd*) and was indeed the practice adopted in the present appeal. It is undisputed that, having obtained the first order by way of an ex parte application, the appellant subsequently served the first order on the respondents. The respondents successfully applied to intervene in the first OS proceedings, and were given an opportunity to make representations in respect of their application to set aside the first order. In these circumstances, no prejudice or breach of natural justice could be said to have been occasioned to the respondents, by reason of the ex

parte nature of the application or the omission to serve the application on the respondents before the hearing.

[49] Striking parallels can be drawn between the facts of the present case and that of *Tan Kim Hock*. Following the approach in *Tan Kim Hock*, we are of the view that there is nothing inherently objectionable in filing an ex parte application under s 368 of the CA; the general practice is in line with the legislative purpose and does not deprive the affected parties of the right to be heard. In the circumstances of this case, the filing of an ex parte application under s 368(1) of the CA without serving it on the respondents cannot be regarded as an abuse of process.

SPECIFIC STATUTORY REQUIREMENTS IN S 368(2)–(7) OF THE CA

[50] This view is further fortified when the matter is considered in the light of other sub-sections in s 368 of the CA. Section 368(2)–(7) of the CA imposes a number of specific statutory safeguards in respect of restraining orders under s 368(1). Among others, these include:

(a) the pre-conditions for the court to grant a restraining order to a company under s 368(1) of the CA. The court must be satisfied that there is a proposal for a scheme of arrangement, that the restraining order is necessary to enable the company and its creditors to formalise the scheme for approval, that a statement of particulars as to the affairs of the company is lodged together with the application, and that the court approves or appoints a person nominated by the majority of creditors to act as director (s 368(2));

(b) the person approved or appointed by the court has the right of access to all of the company's records, and is entitled to require any information from the company as required (s 368(3));

(c) unless the court otherwise orders, any disposition or acquisition of company property, other than in the ordinary course of business, made after the grant of the restraining order is void. Such an act constitutes an offence (s 386(4)–(7)); and

(d) where a restraining order is granted, the company shall lodge a copy thereof with the registrar and publish a notice of the order in a widely circulated newspaper (s 368(5)).

[51] These statutory requirements are mandatory and any non-compliance may render the restraining order liable to be set aside for irregularity (see *Pelangi Airways Sdn Bhd v Mayban Trustees Bhd*).

[52] Sections 368(2)–(7) of the CA is derived from ss 176(10A)–(10E) of

the Companies Act 1965, which were inserted vide an amendment in 1998. The purpose of the 1998 amendment was 'to ensure that creditors are aware of an application made under sub-s (10) and to ascertain that restraining orders under that subsection are only granted under specific conditions to avoid any abuse' (see: Explanatory Statement to Companies (Amendment) (No 2) Bill 1998, para 13).

[53] It is clear that the legislature had addressed its mind to the specific question of what measures are necessary to ensure that creditors are aware of applications for restraining orders, and to avoid any abuse of process. In doing so, Parliament enumerated the specific and detailed safeguards now housed in s 368(2)–(7) of the CA. However, Parliament did not see it fit to include any requirement for an inter parte application to be made or that the application to be served on the affected creditors prior to the hearing.

[54] This can be contrasted with other provisions of the CA, where Parliament has expressly provided for applications to be served. For instance, it is an express statutory requirement for a creditor applying for a resolution to be cancelled to serve the application on the company as soon as possible pursuant to s 118(4)(a). Also a party applying for leave to proceed against a company in the process of winding-up must serve the application on the liquidator (s 471(2)).

[55] The court may, at times, adopt a strained interpretation and read words into a law to reflect what Parliament would have done if they had the situation in mind, even if the law is 'not happily drafted' (see *Perwira Habib Bank Malaysia Bhd v Lum Choon Realty Sdn Bhd* [2006] 5 MLJ 21 at para [134]; *Nothman v Barnet Council* [1978] 1 WLR 220 at p 228). However, where the legislature had addressed itself to a specific matter and made provision thereon, it does not warrant the court to vary the legislative scheme on the basis that the statute does not do enough.

[56] In the words of Barwick CJ in *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at p 110 (quoted in *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara Malaysa & Anor* [1994] 2 MLJ 114 at p 131):

> [I]f the legislation has made provision for that opportunity [to be heard] to be given to the subject before his person or property is so affected, the court will not be warranted in supplementing the legislation, even if the legislative provision is not as full and complete as the court might think appropriate. Thus, if the Legislature has addressed itself to the question whether an opportunity should be afforded the citizen to be relevantly heard and has either made it clear that no such opportunity is to be given or has, by its legislation, decided what opportunity should be afforded, the court being bound by the legislation as much as is the citizen, has no warrant to vary the legislative scheme.

[57] With regard to s 368 of the CA, the Legislature had evidently addressed its mind to the necessary safeguards and measures to prevent abuse of process. It how ever did not consider it necessary to stipulate that an application for a restraining order must be made ex parte or served on the creditors. As such, it is not open for the court to supplant any perceived insufficiencies in the legislation by imposing additional requirements not envisaged by Parliament.

[58] Bearing in mind the preliminary stage at which an ex parte restraining order is usually sought, the concerns of Street J in *Re Jax Marine Pty Ltd and the Companies Act* (1967) 1 NSWR 145 at p 148 are equally relevant to the present context:

> To import into what is normally an ex parte preliminary proceeding a necessity to examine and evaluate particular considerations ... will introduce burdensome and to a large extent ineffectual investigations at this interlocutory state.

CONCLUSION

[59] For all the above reasons, we have concluded that the appellant's application for the first order, on an ex parte basis without serving it on the respondents, is not an abuse of process so as to render the second order liable to be set aside. In the circumstances of this case, the question of law is answered in the negative. Consequently, the appeal is allowed with costs of RM50,000. We hereby reinstate the orders of the High Court.

Leave question answered in the negative; COA's decision set aside; and orders of the High Court reinstated.

Reported by Ashok Kumar